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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1071

HAROLD KONIGSBERG, *Petitioner,*

v.

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER and RAMSEY CLARK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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HAROLD KONIGSBERG, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on October 24, 1969.

OPINIONS BELOW

The opinion of the district court is reported at 285 F. Supp. 585. The opinion of the court below (Appendix A, *infra,* pp. 1a-7a) is reported at 417 F. 2d 161.[1]

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[1] Pursuant to Rule 23(1)(i), all of the Appendices to this petition have been separately bound.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. 8a) was entered on October 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, when a Federal prisoner has been certified pursuant to 18 U.S.C. § 4241 as being of unsound mind and has been sent to the Medical Center for Federal Prisoners for further confinement as provided therein, "until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence * * * shall have been served," the Attorney General nonetheless has power under 18 U.S.C. § 4085 to transfer such prisoner to State authorities for trial in a State court while such certification is still in effect.

2. Whether the doctrine that the power of a State court to try a person in actual State custody is not impaired by the means by which such person is brought within the State court's jurisdiction has any application to a Federal prisoner who was never actually released to State custody, but was at all times during his trial in the State court housed under Federal authority as a Federal prisoner, accompanied by a Federal marshal at all pertinent times, and then returned to Federal prison at the conclusion of his State trial.

STATUTES INVOLVED

The statutes involved are set forth in Appendix C, *infra*, pp. 9a-16a.

STATEMENT

The facts of this case are few, simple, and undisputed.

Petitioner is serving a 10-year sentence adjudged in the United States District Court for the District of New Jersey and thereafter affirmed on appeal. *United States* v. *Konigsberg*, 336 F. 2d 844 (C.A. 3), certiorari denied, 379 U.S. 933.

Following commitment in the Federal Correctional Institution at Danbury, Connecticut, in 1964, he was, in August 1965, transferred to the Medical Center for Federal Prisoners on direction of the Attorney General pursuant to 18 U.S.C. § 4082 (*infra,* Appendix C, p. 9a).

Shortly thereafter, pursuant to 18 U.S.C. § 4241 (*infra,* Appendix C, pp. 10a-11a), petitioner was examined by the Board of Examiners at that institution. This Board on November 16, 1965, reported to the Attorney General that he was of unsound mind (Appendix D, *infra,* at p. 17a), and the Attorney General caused an order of certification of insanity to issue on April 5, 1966 (*ibid.* at p. 18a).

Thereafter, in October 1966, while the foregoing certification was in full force and effect, the Attorney General authorized petitioner's removal to New York on a writ of habeas corpus *ad prosequendum* to stand trial for extortion and related counts (Appendix E, *infra,* p. 19a). Petitioner was not actually released to State custody, but was housed under Federal authority as a Federal prisoner and was accompanied by a Federal marshal at all pertinent times (*infra,* p. A3).

At the ensuing New York trial in the State court petitioner was convicted and sentenced to a term of 33 to 40 years. At the conclusion of that trial, he was returned to the Medical Center at Springfield. Thereafter, on August 21, 1967, following a decertification five days earlier, petitioner's administrative status was changed to that of a sane person requiring medical care and treatment not available in an existing penal institution (Response to Order to Show Cause, dated Sept. 6, 1967, par. 7).

Petitioner then brought a petition for a writ of habeas corpus in the United States District Court for Western Missouri, asserting numerous grounds for relief, the only one now material being that the Attorney General lacked authority to allow him to be tried for the State offense prior to a decertification indicating that he had been restored to

sanity or health, and that the New York conviction should accordingly be vacated. Relief on that ground was denied, *Konigsberg* v. *Ciccone,* 285 F. Supp. 585, 601-602, and petitioner appealed.

The court below held that it had no authority to vacate petitioner's conviction by the court of New York State, held that certification at the Medical Center would not in itself prove his later incompetency at the trial, and, without addressing itself specifically to the question whether the Attorney General's power to release a Federal prisoner to a State was qualified by any of the provisions of Chapter 313 of Title 18, U.S.C., Mental Defectives, affirmed the ruling below.

Certain collateral proceedings should be briefly mentioned.

1. Petitioner's direct appeal from his New York conviction is now pending in the Appellate Division of the New York Supreme Court for the First Department; it has not yet been argued.

2. Before his New York trial commenced, petitioner sought habeas corpus relief in the United States District Court for the Southern District of New York. *Konigsberg* v. *Clark,* 66 Civil 4150, filed December 5, 1966. Relief was denied, and an appeal to the Second Circuit was eventually dismissed for want of prosecution. See No. 802, this Term, seeking certiorari to review that dismissal. The record in that case does not reflect the facts concerning the present petitioner's continuous Federal custody in the course of his State prosecution that are set forth in the opinion below in this case (*infra,* p. 3a).

3. As a matter of completeness, although this third proceeding is quite irrelevant to the issues canvassed here, it should be noted that, on November 28, 1969, the Third Circuit affirmed the denial of petitioner's motion under 28 U.S.C. § 2255 to vacate the sentence under which he is now in custody. *Kongisberg* v. *United States,* No. 17882.

REASONS FOR GRANTING THE WRIT

This case presents two vitally important questions.

The first concerns the power of the Attorney General of the United States to transfer to a State for prosecution a Federal prisoner concerning whom there is in effect an unrevoked statutory determination that he is of unsound mind.

The second is whether such transferred prisoner was ever in State custody as a matter of law when in fact he was never released but continued in actual Federal custody throughout the State trial, after which he was returned to the Federal prison whence he was originally removed and where he still remains.

First. Even before there was express authority to turn over a Federal prisoner for State prosecution, inherent power to do so existed "except when special statutes make an exception." *Ponzi* v. *Fessenden,* 258 U.S. 254, 264. The present express transfer authority, 18 U.S.C. § 4085 (Appendix C, *infra,* pp. 9a-10a), on which both courts below relied (285 F. Supp. at 601-602; Appendix A, *infra,* pp. 3a-4a), does not purport to override the statutory provisions for mental defectives (18 U.S.C., ch. 313, §§ 4241-4248, Appendix C, *infra,* pp. 10a-15a); and the committee reports on the Act of April 30, 1940, c. 176, 54 Stat. 175, from which § 4085 was drawn, show that the principal reason for its enactment was to relieve the demanding State from making the wholly artificial showing that the Federal prisoner it sought to prosecute was a "fugitive from justice" so as to be subject to formal extradition.[2]

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[2] See H.R. Rep. 1885 and Sen. Rep. 1410, both 76th Cong., 3d Sess. The latter, though identical in substance is slightly more ssuccinct; it states:

> "The necessity for the enactment of this measure arises in the interpretation of the word 'fugitive' under extradition laws. It has been gravely doubted, even to the extent that requests for extradition have been refused, that a prisoner taken from one State to another for purposes of incarceration

Once the scheme of Chapter 313 is looked to, it is plain that no statute contemplates giving the Attorney General power to transfer for State prosecution a Federal prisoner formally declared incompetent under the statutory provision for such declarations.

Section 4241, which has remained unchanged since its enactment in 1930 (Section 6 of the Act of May 13, 1930, c. 254, 46 Stat. 270, 271), provides that (*infra*, at p. 11a) a prisoner so declared to be of unsound mind shall be "kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served." [3]

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in a Federal institution is a fugitive in the sense that his removal is an involuntary one. The bill would allow a prisoner to be taken to a State where he is wanted so that on his release there he would be subject to the State authorities. The Attorney General has recommended the enactment of the bill."

[3] See H.R. Rep. 102, 71st Cong., 1st sess., p. 2, quoting from the Attorney General's letter that proposed the legislation:

"The bill as drafted is substantially the same as the ones authorizing two new correctional institutions. It has, however, one section which provides a board of examiners to pass on all cases to be sent to the hospital for defective delinquents. The reason for this provision was the feeling that no person, even though he is in prison, ought to be stigmatized as insane except by formal proceedings of a qualified board. Moreover, it was felt some such board was desirable to make certain that only cases really demanding special treatment would be transferred to the hospital for defective delinquents.

"The bill also has a section which makes it the duty of the prison officials to see that no person who is suffering from a mental disease is turned loose upon the public without first trying to get the particular State concerned to take him in charge. At present, if the officials believe a convict whose sentence has expired is still insane, they continue to hold him unless his release is sought by one of his friends through legal process. In such cases they have no alternative but to release him as their jurisdiction ended with the expiration of the sentence. The proposed provision would authorize a definite procedure for handling such cases."

The "without deduction" clause was construed by Judge (later Mr. Justice) Whittaker in *Weldon* v. *Steele*, 125 F. Supp. 667 (W.D. Mo.).

Section 4242 (*infra*, p. 11a) provides for retransfer to other penal or correctional institution upon restoration of sanity, while § 4243 (*ibid.*) covers delivery to state authorities on expiration of sentence if at that date the prisoner "is still insane or a menace to the public." Neither section contemplates what was done here, namely, transfer for State prosecution of a prisoner who is under a subsisting determination of insanity; and the scheme of the several sections comprising Chapter 313 of Title 18 forbids such an act by clearest implication.

Section 4247 (*infra*, pp. 14a-15a) provides an alternative procedure where the prisoner is still insane upon expiration of his sentence, while Section 4248 (*infra*, p. 15a) deals with the termination of custody by release or transfer in respect of a prisoner committed under § 4247; neither is applicable here.[4]

Without laboring the point, it is petitioner's position that the Attorney General may not lawfully transfer to a State for prosecution a Federal prisoner held under a § 4241 determination that he is of unsound mind, and that this result follows from the statutory scheme. Moreover, to the extent that the statutes are less clear than we think they are, the same result must follow under the principle that statutes are to be construed to avoid even raising important constitutional questions. *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127, 137-138; *Machinists* v. *Street*, 367 U.S. 740, 749-750; *Lynch* v. *Overholser*, 369 U.S. 705, 710-711. It being clear that the conviction of a legally incompetent

[4] Sections 4244-4248 were held constitutional in *Greenwood* v. *United States*, 350 U.S. 366 (1955). More recently, however, §§ 4244 and 4246 have been ruled unconstitutional by a district court. *United States* v. *Jackson*, N.D. Calif., No. 41713 Crim., Nov. 13, 1969, Zirpoli, D.J., not yet reported.

person offends against due process of law (*Pate* v. *Robinson,* 383 U.S. 375, 378), it necessarily follows that a similar violation is involved in turning over such a person for prosecution; and since the prisoner here transferred was under a statutory determination that he was indeed of unsound mind, the statutes should not be construed to legalize such a transfer for purposes of prosecution even if the matter were otherwise in doubt.

Second. It is of course well settled, and we do not seek to question the rule even glancingly, that the courts will not inquire how a prisoner came into the hands of the convicting State; forcible abduction, kidnaping, irregularities in interstate rendition are all immaterial to the validity of any conviction that follows such acts. In this Court that rule, first laid down in *Ker* v. *Illinois,* 119 U.S. 436, was last restated by a unanimous bench in *Frisbie* v. *Collins,* 342 U.S. 519.

But, in those cases as in all the others here on the same point (*Mahon* v. *Justice,* 127 U.S. 700; *Cook* v. *Hart,* 146 U.S. 183; *Lascelles* v. *Georgia,* 148 U.S. 537; *Ex parte Johnson,* 167 U.S. 120; *Pettibone* v. *Nichols,* 203 U.S. 192), the prisoner was, as stated in the last decision cited (203 U.S. at 215) "held in actual custody" by the State.

That was not the fact here; the distinguishing feature of this case is that the present petitioner remained in Federal custody throughout the State proceedings and was never transferred to State custody.

1. He was in actual Federal custody at the Medical Center in Springfield when the Director there was ordered to honor New York's writ of habeas corpus *ad prosequendum* (Appendix E, *infra,* p. 19a).

2. Then, to quote the opinion below (*infra,* p. 3a), "He was not actually released but was housed under federal authority as a federal prisoner and accompanied by a federal marshal at all pertinent times."

3. Continuing to quote from the opinion below (*ibid.*), "Upon conclusion of the New York trial, he was returned to the Medical Center at Springfield." (Then, and only then, was he decertified; *supra*, p. 3.)

We submit that in those circumstances the jurisdiction of the State never attached, any more than State jurisdiction can attach to a prisoner (*Ableman* v. *Booth*, 21 How. 506) or a soldier (*Tarble's Case*, 13 Wall. 397) of the United States. Such jurisdiction cannot exist or commence or be exercised until and unless the prisoner in question is actually and factually released from Federal to State custody. Here, as the precise language of the opinion below makes crystal clear (*infra*, p. 3a), no such release ever took place.

Third. The basic habeas corpus statute (28 U.S.C. § 2243; *infra* at p. 16a) directs the court to "dispose of the matter as law and justice require." And habeas corpus, it has twice in recent years been emphasized by this Court, "is not now and never has been a static, narrow, formalistic remedy." *Jones* v. *Cunningham*, 371 U.S. 236, 243; *Peyton* v. *Rowe*, 391 U.S. 54, 66.

There is accordingly no impediment to an ultimate declaration in the present habeas corpus proceeding that the Attorney General acted otherwise than in accordance with law in turning over to a State for prosecution a Federal prisoner whose § 4241 certification of unsound mind was then in effect unrevoked. Nor is there any obstacle to the further declaration that, since such prisoner was never in fact released to the actual custody of the State, the State lacked jurisdiction to convict him, with the result that its action purporting to do so while he remained in actual and continuing Federal custody was and remains a nullity.

It cannot be supposed that, if this Court should so declare, the New York courts would disregard its declaration. In any event, further review here is available in the unlikely event that those courts should nonetheless undertake to hold the contrary.

Fourth. Finally, we recognize that this is truly a case of first impression. But that circumstance should not preclude review. In the converse situation, where the Federal prisoner sought rather than resisted trial by the State, on the footing of his constitutional entitlement to a speedy trial, the decision here was also a case of first impression. *Smith* v. *Hooey,* 393 U.S. 374, 384.

Moreover, and in any event, whenever any person has been dealt with as this petitioner has been, transferred by the Attorney General while under certification of insanity for State prosecution, and yet never actually released to State custody, but instead kept as it were in a Federal cocoon while the State subjected him to an additional (and indeed savage) sentence of 33 to 40 years—whenever, as we say, a single human being has been so treated, this Court should afford redress. Failure to grant review here would not only condone injustice to an individual, it would ignore a grave impropriety in the Federal-State relationships that should govern law enforcement.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1970.